

**IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON**

**RICHARD J. ROBERTS and
ELIZABETH A. ROBERTS,**

Plaintiffs/Appellants

VS.

FEDERAL EXPRESS CORPORATION,

Defendant/Appellee

)
)
) Shelby Circuit No. 27981-2 T.D
)

)
) Appeal No. 02A01-9502-CV-00019
)

FILED

March 14, 1996

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE JANICE HOLDER, JUDGE

Cecil Crowson, Jr.
Appellate Court Clerk

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**REVERSED IN PART,
AFFIRMED IN PART AND
REMANDED FOR A NEW TRIAL**

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

W. FRANK CRAWFORD, PRESIDING JUDGE

DAVID R. FARMER, JUDGE

OPINION

This malicious prosecution action involves the question of whether the defendant had probable cause to institute criminal proceedings against the plaintiff, a former employee.

On motion for summary judgment, the initial trial judge said, yes, probable cause existed. So did this Court. The Supreme Court disagreed, holding that, "Under the facts presented, reasonable minds could differ as to whether probable cause existed for bringing charges against Plaintiff." *Roberts v. Federal Express Corp.*, 842 S.W.2d 246, 249 (Tenn. 1992). The case was thereupon remanded for trial, which resulted in a hung jury. A second trial resulted in verdicts for the plaintiffs for compensatory damages, and a finding that they were entitled to punitive damages.

The defendant filed a motion for judgment NOV, for a new trial and for a mistrial. The trial judge filed a scholarly and quite lucid memorandum which we reproduce verbatim:

Upon all the evidence presented and for the reasons set forth herein and by the Court when ruling, the Court finds that reasonable minds could not differ on the issue of probable cause and could only conclude that the Plaintiffs have failed to meet their burden to prove a lack of probable cause. As a matter of law, the Court directs a verdict for the Defendant because reasonable minds could only conclude that the evidence failed to show that the Defendant acted without probable cause.

Upon all the evidence presented and for the reasons set forth herein and by the Court when ruling, the Court directs a verdict for the Defendant finding, as a matter of law, that reasonable minds could not differ and could only conclude that the Defendant conducted a reasonable investigation under the circumstances.

Upon all the evidence presented and for the reasons set forth herein and in its ruling, the Court further finds that the Plaintiffs failed to prove liability for punitive damages by clear and convincing evidence in accordance with the standards set by *Hodges v. S.C. Toof & Company*, 833 S.W.2d 896 (Tenn. 1992) and, therefore, directs a verdict for the Defendant on the issue of liability for punitive damages. The Court finds that reasonable minds could not conclude that the evidence in this case proves liability for punitive damages by clear and convincing evidence. The Court orders that a directed verdict be entered for the Defendant holding it not liable for punitive damages as a matter of law.

Since the claims of Plaintiff, Elizabeth Roberts, are derivative only, the Court further directs a verdict in favor of the Defendant on her claims.

In the event the directed verdicts constituting this judgment, on appeal, are subsequently vacated or reversed in part or in whole, the Court enters the following conditional ruling on the Defendant's Motion for Mistrial and new trial pursuant to Civil Rules 50.03 and 59. As a conditional ruling and for the reasons set forth herein and by the Court when ruling, the Court finds that the defendant's Motion for Mistrial is well taken and grants a conditional new trial of this case. The Court finds that Plaintiffs' counsel made improper arguments at the close of the liability phase of this case which served to inflame and bias the jury, ultimately affecting the fairness of the trial, and which are curable only by granting a new trial. The Court finds that Plaintiffs' counsel made improper arguments to the jury suggesting that they place themselves in the shoes of the Plaintiff, Richard Roberts, that such arguments were substantial and an improper solicitation to the jury for application of the Golden Rule to the Plaintiffs. The Court conditionally grants the Defendant's Motion for Mistrial and conditionally orders a new trial based on the improper argument of Plaintiffs' counsel.

Alternatively, in the event the directed verdicts constituting this judgment, on appeal, are subsequently vacated or reversed in part or in whole, this Court enters the following further conditional ruling. The Court finds that the jury's verdicts are contrary to the weight of the evidence and that the evidence introduced at the trial of this case preponderates in favor of a verdict for Federal Express on all of the Plaintiffs' claims. The Court conditionally grants the Defendant's Motion for New Trial because the jury's verdicts are contrary to the weight of the evidence.

The plaintiffs insist that the opinion of the Supreme Court is the law of the case. They say the trial judge in effect overruled the Supreme Court and was without authority either to take the case from the jury or later to direct verdicts. The defendant says that the case was before the Supreme Court on motion for summary judgment and that the trial judge nevertheless "retained the authority to determine, as a matter of law, if reasonable minds could reach a differing result on the issue of probable cause."

For a recitation of the evidence, we refer to the prior opinion of this Court and to the published opinion of the Supreme Court. The trial judge, in announcing the directed verdicts, stated, "The evidence in this case does not materially differ, as I see it from the facts the Supreme Court set forth." So it is that the issue of probable cause in this case is for the jury to decide, *Roberts, supra*, and the trial judge erred in directing verdicts. See *Barger v. Brock*, 535 S.W.2d 337 (Tenn. 1976).

But we do not agree with the plaintiff that the verdicts must be reinstated.

The trial judge, who was acutely aware of the apparent restrictions on her function to determine if the evidence was sufficient to establish probable cause, performed in the clearest way possible her role as thirteenth juror. See *Mize v. Skeen*, 468 S.W.2d 733, 735 (Tenn. App. 1971) She disapproved the verdicts, and there the matter ends. Further elaboration seems unnecessary.

We also agree that the argument of Plaintiffs' counsel justified the mistrial.

We reproduce the objectionable portion:

The humiliation, the embarrassment. Yeah, go on down to the jail sometime if you don't have anything to do and get strip searched. Have your body cavities searched. That's a good Sunday afternoon activity.

How much do I pay you if I said, look, come on, you will like it. How much would you take just for that?

. . . Now, what if I just made a deal with you. I say to you now, here is my deal: You can tell me however much you want me to pay you and I will pay you that amount of money. But this is what you got to do. You got to let me bring charges against you for grand larceny.

. . . Malice? Malice? I suggest to you they didn't have any expectation that this man would be convicted. They didn't have any expectation. It's sort of like punishment. Throw him out there and put him in the system and let it grind him up a little bit. And we will teach him a lesson. And we will teach all the other employees there a lesson, too.

So--the real thing. If they will do this to Richard Roberts, who is very popular there, been one of the longest employees at that place, and the message goes out, if they will do that to Richard Roberts, and I am just the handler, a part time employee, what in the world will they do with me? Grind him up a little bit.

See *Prewitt-Spurr Mfg. Co. v. Woodall*, 115 Tenn. 605, 90 S.W.2d 623 (1905); *Klein v. Elliot*, 436 S.W.2d 867, 880 (Tenn. App. 1968). These Golden Rule arguments, so-called, are inflammatory, as they are intended to be, and inevitably will destroy the verdict. See *City of Gallatin v. Jackson*, 1991 WL 1051 (Tenn. App. 1991); *Gray v. Bernard*, 1992 WL 52697 (Tenn. App. 1992).

Finally, we agree that the trial judge properly directed a verdict on the issue of punitive damages, because of the rigid requirements of *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900-902 (Tenn. 1992), which restricts awards of punitive damages

to cases involving the "most egregious of wrongs." *Hodges*, 833 S.W.2d at 901.

This is not such a case.

In order to restrict the awarding of punitive damages to cases involving the most egregious of wrongs, *Hodges* holds that punitive damages can be assessed only if "a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly." *Id.* But the Court went further:

. . . Because punitive damages are to be awarded only in the most egregious of cases, a plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence. *Id.*

The court defined "clear and convincing evidence" as "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Id.*

There is no clear and convincing evidence of any of the conduct set forth in *Hodges*.

The plaintiff offered no evidence of a deliberate intent to harm him. It is established that "the action of the prosecutor is not malicious although it may be influenced to some extent by other and forbidden considerations," and "a desire to deter others from committing crime by making an example of the offender is a proper motive." *Cohen v. Ferguson*, 336 S.W.2d 949, 953-54 (Tenn. App. 1959). The defendant's decision to refer the matter to the police on the basis that its reasonable investigation and belief in Roberts' guilt so justified is not equatable to the kind of criminal intent the *Hodges* court (citing TENN. CODE ANN. § 39-11-302(a)(1991)'s definition of criminal intentionality) had in mind. The referral to the police seemingly was justified and necessitated by the defendant's legitimate desire to protect its customers' property. We believe the defendant's need to deter employees from stealing the articles entrusted to it matches the defendant's desire in *Cohen* to deter people from taking parts from his junkyard.

The plaintiff makes no claim that the defendant acted fraudulently, and there is no evidence that it was "motivated by ill will, hatred or personal spite," as is required for a finding of malice. *Hodges*, 833 S.W.2d at 901.¹

The judgment is reversed in part, affirmed in part and remanded to the trial court. Costs are assessed evenly to the parties.

William H. Inman, Senior Judge

Concur:

W. Frank Crawford, Presiding Judge

David R. Farmer, Judge

¹*Hodges* involved a retaliatory discharge occasioned by the plaintiff's jury services. A principal issue was the propriety of punitive damages. The Supreme Court availed itself of *Hodges* to re-examine and modify the manner in which punitive damages are awarded in Tennessee, to the end that unlimited jury discretion in the fixing of such damages may be curtailed. Many, if not most, actions for punitive damages allege malice, the desire to harm another, which *Hodges* succinctly addresses.